



Tokimo Hardware Supplies Limited v Yasian Technology Company Limited (Commercial Case E025 of 2024) [2025] KEHC 2789 (KLR) (Commercial and Tax) (7 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E025 OF 2024**

MN MWANGI, J

MARCH 7, 2025

BETWEEN

TOKIMO HARDWARE SUPPLIES LIMITED APPLICANT

AND

YASIAN TECHNOLOGY COMPANY LIMITED RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 5th February 2024 pursuant to the provisions of Sections 1A, 1B, 3A, 63(e) & 79G of the *Civil Procedure Act*, Order 42 Rule 6(1) & (2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The applicant seeks that it be granted leave to file an appeal out of time against the judgment dated 7th July 2023, the decree issued on 16th October 2023, and the ruling delivered on 14th December 2023, in Nairobi SCCCMM E5266 of 2022 - Yasian Technology Company Limited v Tokimo Hardware Supplies Limited, that the annexed Memorandum of Appeal be admitted as being properly filed, and for the enforcement and/or execution of the said judgment, decree, and ruling to be stayed pending the hearing and determination of the intended appeal.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Cynthia Atieno Barasa, the applicant's Director. She averred that the respondent instituted a claim against the applicant on 1st September 2022 for Kshs.956,540.53 for goods sold between the years 2020 and 2022. That although the applicant denied the claim vide a statement of response dated 20th September 2022, the Small Claims Court delivered a judgment in favour of the respondent on 7th July 2023. She contended that the said judgment is invalid having been delivered beyond the Court's jurisdiction period under Section 34(1) of the *Small Claims Court Act*. That thereafter, the applicant filed an application dated 2nd November 2023 challenging the judgment



- delivered by the Small Claims Court on that basis, but the application was dismissed on 14th December 2023.
3. Ms Barasa asserted that even if the Small Claims Court had jurisdiction to hear and determine disputes past the sixty (60) days, the Court still erred on other matters of law such as failing to exercise discretion in admitting or considering the respondent's evidence and finding that there existed a new contractual relationship in respect to the awarded decretal sum. She averred that dissatisfied with the said decision, they wish to challenge it on appeal. Ms Barasa stated that the applicant fears imminent execution of the decree, which could cause significant financial harm to it and render the intended appeal nugatory. She urged this Court to grant the orders sought and set reasonable security for costs.
 4. In opposition to the application, the respondent filed Grounds of Opposition dated 22nd February 2024 raising the following grounds –
 - i. The application is incompetent and misconceived as the impugned order is not appealable as of right under Order 43 Rule 1 of the Civil Procedure Rules, 2010;
 - ii. The appellant/applicant having opted to apply for review of the order cannot come back to appeal after the review application was denied; and
 - iii. The appellant/applicant is on a fishing expedition and its application is vexatious and an abuse of the Court process.
 5. The instant application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Brian Njau & Company Advocates on 21st October 2024, whereas the respondent's submissions were filed on 18th July 2024 by the law firm of O'kubasu & Munene Advocates.
 6. Mr. Njau, learned Counsel for the applicant submitted that the Small Claims Court's decision which the applicant wishes to appeal against was founded on Section 41 of the *Small Claims Court Act* on review of orders or awards of the Court, thus it is appealable as of right pursuant to the provisions of Section 38(1) of the *Small Claims Court Act*. He relied on the case of Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR, and submitted that the Memorandum of Appeal filed herein was filed within time in respect to the review decision of 14th December 2023, but since the appeal is also in respect to the judgment of 7th July 2023, leave to appeal was necessary.
 7. He cited the Court of Appeal case of Butt v Rent Restriction Tribunal [1979] eKLR, and submitted that in determining whether or not to grant an order for stay of execution, the Court must balance the applicant's interest in preserving the status quo to prevent the appeal from being rendered nugatory against the respondent's rights to enjoy the fruits of its judgment. He referred to the case of Silas Kanyolu Mwatha v Josephine Kavive James [2021] eKLR, and submitted that the respondent's right to enjoy the fruits of its judgment shall not be hampered as the applicant is willing to deposit a reasonable amount as security for costs. He asserted that the intended appeal is arguable with a high chances of success thus granting a stay of execution is necessary to prevent the appeal from being rendered academic.
 8. Mr. O'kubasu, learned Counsel for the respondent submitted that the instant application is an abuse of the Court process since after invoking the review jurisdiction and pursuing it to dismissal, the applicant cannot appeal from the same orders made under the decree of 16th October 2023. He contended that once a party seeks a review under Order 45 Rule 1 of the Civil Procedure Rules, 2010, and it is concluded, they cannot appeal from the original orders but can only appeal from the dismissal of the review application. To buttress these submissions, Counsel relied on the case of HA v LB [2022] eKLR



and the Court of Appeal case of The Chairman Board of Governors Highway Secondary School v William Mmosi Moi, Civil Application No. 277 of 2005.

Analysis And Determination.

9. I have considered the application filed herein, the grounds on the face of it, and the affidavit filed in support thereof. I have also considered the respondent's Grounds of Opposition as well as the written submissions by Counsel for the parties. The issues that arise for determination are -
- i. Whether leave to file an appeal out of time should issue to the applicant; and
 - ii. Whether an order for stay of execution pending appeal should issue.

Whether leave to file an appeal out of time should issue to the applicant.

10. The applicant seeks to lodge an appeal against the judgment and ruling of the Small Claims Court delivered on 7th July 2023 and 14th December 2023, respectively. The applicant contends that the Memorandum of Appeal filed herein is within time in respect to the ruling delivered on 14th December 2023, but since the appeal is also in respect to the judgment of 7th July 2023, leave to appeal is necessary. The respondent on the other hand submitted that the applicant cannot appeal from the orders made under the decree of 16th October 2023 as he filed an application for review against the said orders and the application was dismissed in a ruling delivered on 14th December 2023. The respondent asserted that the applicant can only appeal against the said ruling.
11. I appreciate the fact that applications for review of decrees or orders are provided for under Order 45 Rule 1 of the Civil Procedure Rules, 2010, which allows parties to apply for review of a decree or order in instances where an appeal is not allowed and/or a litigant does not wish to pursue an appeal against a decree or order. On perusal of the ruling delivered on 14th December 2023, I however note that in as much as the applicant's application was for review, it was not filed pursuant to the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010, but under the provisions of Section 41(b) of the *Small Claims Court Act* which states that -
- An Adjudicator may, on application by any aggrieved party or on his or her own motion, review any order of the Court on the ground that—
- a. ...
 - b. the claim or order was outside the jurisdiction of the Court.
12. I am of the considered view that by filing the application for review, the applicant was not barred from lodging an appeal against the Small Claims judgment delivered on 7th July 2023. It is not in contest that the appeal against the ruling delivered on 14th December 2023 having been filed on 5th February 2024 was filed within the prescribed timelines. This therefore means I am left to determine whether or not I should extend time for the applicant to lodge an appeal against the judgment delivered on 7th July 2023.
13. I have the discretion to extend time within which a dissatisfied party can lodge an appeal against the decision of a Subordinate Court pursuant to the provisions of Section 79G of the *Civil Procedure Act* which states that -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the applicant of a copy of the decree or order;



Provided that an appeal may be admitted out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

14. The Supreme Court in the case of Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others [2018] eKLR, set out the guiding principles when it comes to extension of time, conditions which were also expressed in the case of Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others [204] eKLR, as follows -

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion -

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. a party who seeks...extension of time has the burden of laying a basis to the satisfaction of the Court;
 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 4. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. whether the application has been brought without undue delay; and,
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.
15. The judgment the applicant seeks to appeal against was delivered on 7th July 2023. As already stated before, the applicant filed an application under Section 41(b) of the *Small Claims Court Act* challenging the validity of the said judgment on the ground that it was issued outside the jurisdiction of the Court. Further, it is evident from the Memorandum of Appeal annexed to the applicant's affidavit in support of the instant application that one of the grounds of the applicant's appeal is that the learned Adjudicator erred in law by failing to appreciate and render judgment within sixty (60) days from the date of filing of the claim as provided for under Section 34(1) of the *Small Claims Court Act*. I must however state that the applicant herein was prudent by waiting for delivery of the Small Claims Court ruling before pursuing an appeal against the judgment delivered on 7th July 2023, so that the issues complained of can be determined in one appeal.
16. In the premise, I find that the delay in lodging an appeal against the Small Claims Court judgment of 7th July 2023 though inordinate, has been sufficiently explained. It is therefore excusable.
17. It is noteworthy that the instant application was filed on 5th February 2024, approximately seven (7) months after delivery of the judgment in question. However, in view of the fact that the Trial Court delivered its ruling on the applicant's application challenging the validity of the judgment delivered on 7th July 2023 on 14th December 2023, the provisions of Order 50 Rule 4 of the Civil Procedure Rules, 2010, kicked in, which provide that the period between the 21st of December in any year and the 13th of January the following year, both days included, shall be omitted from any computation of time. It is therefore my finding that the instant application was filed timeously.



18. As already stated herein before, one of the grounds of the applicant's appeal is that the learned Adjudicator erred in law by failing to appreciate and render judgment within sixty (60) days from the date of filing the claim as provided for under Section 34(1) of the *Small Claims Court Act*. In my considered view that is an arguable issue that ought to be determined on merits. On the issue of the prejudice that may be occasioned on the respondent, this Court notes that the respondent has neither alleged nor demonstrated that it stands to suffer any prejudice in the event that the applicant is granted leave to appeal against the judgment and ruling of the Small Claims Court. I am therefore not persuaded that the respondent stands to suffer any prejudice in the event that the applicant is granted leave to appeal out of time.
19. It is my finding that the applicant's application for leave to file an appeal out of time is merited.

Whether the applicant has established a case to warrant being granted an order for stay of execution pending appeal.

20. Stay of execution pending Appeal is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which states that –
- No order for stay of execution shall be made under sub-rule (1) unless-
- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
21. As was correctly submitted by Counsel for the applicant, in determining an application for stay of execution pending appeal, Courts are under a duty to balance the competing interests of the parties whilst taking into account the fact that an appellant or intended appellant has an undoubted right of appeal whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason. The Court of Appeal in the case of *Vishram Ravji Halai v Thornton & Turpin* [1990] KLR 365, held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules, 2010 is fettered by three (3) conditions namely –
- i. establishment of a sufficient cause;
 - ii. satisfaction of substantial loss; and
 - iii. the furnishing of security.
22. Earlier on in this ruling, I made a finding that the applicant's intended appeal raises arguable issues that should be determined on merits and that the instant application was filed timeously. The only issues then left for determination is whether the applicant shall suffer substantial loss in the event that an order for stay of execution pending appeal is not granted, and whether there is need for an order for furnishing of security against the applicant.
23. It is not in contest that the decree that the applicant seeks to stay is a money decree. It is trite that when a decree is a money decree, Courts will not readily grant an order for stay of execution pending appeal unless it is demonstrated that the decree-holder is not financially sound, and that he is incapable of refunding the decretal sum to the judgment debtor in the event that the appeal is successful. In the



case of Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR, the Court of Appeal held that -

Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.

24. In this case, the applicant neither averred nor alluded to the respondent’s inability to refund the decretal sum in the event it was successful in its intended appeal. Further, in as much as the applicant contends that it stands to suffer substantial loss, it did not put forth its current financial position and how the same would be affected in the event an order for stay of execution pending appeal was not granted.
25. I am as such not persuaded that the applicant stands to suffer any substantial loss in the event that an order for stay of execution pending appeal is not granted.
26. On the issue of deposit of security for the due performance of the decree, the applicant in its affidavit in support of the instant application expressed willingness to provide security for the due performance of the subject decree. In the case of Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR, the Court held that -

Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.

27. It is now well settled that in the absence of proof of substantial loss, Courts will rarely grant an order for stay of execution pending appeal. See the Court’s finding in the case of Kenya Shell Limited v Kibiru [1986] KLR 410. In this instance, in view of the fact that the applicant has demonstrated that it has an arguable appeal and it is ready and willing to offer security for the due performance of the decree, this Court finds that it is in the interest of justice to grant an order for stay of execution of the subject decree pending the hearing and determination of the intended appeal.
28. I note that the applicant also seeks an order for stay of execution of the Small Claims Court’s ruling delivered on 14th December 2023, which dismissed the applicant’s application to inter alia, review and/or discharge its judgment delivered on 7th July 2023, which means that it did not result in any positive order capable of being stayed. It is now well settled that an order for stay of execution can only be issued against a positive order.
29. The Court of Appeal in the case of Western College of Arts and Applied Sciences v Oranga [1976] KLR 63, at 66, when faced with a similar situation made the following observation –

In the instant case the High Court has not ordered any of the parties to do anything, or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or restrain by injunction.

30. In the circumstances, I find that an order for stay of execution against the Small Claims Court’s ruling delivered on 14th December 2023 cannot issue.
31. The upshot is that the instant application is partly merited. As a result, I issue the following orders –



- i. Leave is hereby granted to the applicant to file an appeal out of time against the judgment dated 7th July 2023, the decree issued on 16th October 2023 and the ruling delivered on 14th December 2023, in Nairobi SCCCMM E5266 of 2022 - Yasian Technology Company Limited v Tokimo Hardware Supplies Limited;
- ii. The applicant shall file and serve a Memorandum of Appeal within 14 days from today;
- iii. An order for stay of execution of the judgment dated 7th July 2023 and the decree issued on 16th October 2023 in Nairobi SCCCMM E5266 of 2022 is hereby issued pending the hearing and determination of the intended appeal;
- iv. The applicant shall deposit the entire decretal sum in a joint interest earning account in the names of the Advocates for the parties within thirty (30) days from the date of this ruling;
- v. In default of order No. (iv), the instant application shall be deemed to have been dismissed and the respondent shall be at liberty to execute; and
- vi. Costs shall abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF MARCH 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Njau for the applicant

Ms Naliaka h/b for Mr. O'kubasu for the respondent

Ms B. Wokabi – Court Assistant.

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